

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALICIA D. DUBOISE
Claimant

VS.

HALLMARK CARDS, INC.
Respondent
Self-Insured

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Docket No. 1,003,987

ORDER

Both claimant and respondent appeal the February 28, 2005 Award of Administrative Law Judge Bryce D. Benedict. Claimant was awarded benefits for a 5 percent impairment to the right upper extremity. This matter was placed on summary docket and deemed presented as of May 6, 2005.¹

APPEARANCES

Claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, John D. Jurcyk of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

What is the nature and extent of claimant's injury? Claimant was awarded a 5 percent impairment to the right upper extremity for the injuries suffered through May 7, 2002, through a series of accidents. Claimant alleges entitlement to a 10 percent impairment to the body as a whole based upon the myofascial pain syndrome diagnosis of internal medicine specialist Douglas M. Rope, M.D. Respondent contends that neither

¹ K.S.A. 2001 Supp. 44-551(b)(1).

Dr. Rope nor board certified internal medicine and occupational medicine specialist Chris D. Fevurly, M.D., who treated claimant over a period of several examinations, gave an appropriate impairment rating under the *AMA Guides*.² Respondent, therefore, argues claimant's impairment should be zero.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Award of the ALJ should be affirmed.

Claimant, an employee of respondent since May of 1989, began having problems in 2001, when she began training on a different job. Claimant testified that the job required she turn a wheel which she testified she could not turn. Claimant began experiencing difficulties in her right upper extremity. When she overcompensated by using her left upper extremity attempting to protect the right upper extremity, she then began having bilateral problems.

Claimant was referred to several doctors, the first of whom was Craig L. Vosburgh, M.D., at the Tallgrass Prairie Surgical Specialists in Topeka, Kansas. Dr. Vosburgh, whose records were stipulated into the record by the parties, examined claimant on several occasions, diagnosing only tendinitis to the right upper extremity. Dr. Vosburgh's records do not record left upper extremity complaints. The multiple examinations by Dr. Vosburgh beginning in July of 2000 and proceeding through December of 2001, when claimant was released to return to work normal duties, elicited only subjective complaints. Claimant's examinations were typically normal, with no deformities or swelling noted. Claimant had full range of motion in the right upper extremity at the elbow, wrist and forearm, with motor testing distally being normal. Tinel's was negative. Phalen's examination was negative with claimant experiencing some tenderness in the proximal pronator flexor mass. The initial diagnosis by Dr. Vosburgh, as noted above, was tendinitis in the right forearm, with that diagnosis remaining throughout Dr. Vosburgh's examination and treatment of claimant. Claimant was on light duty on several occasions at Dr. Vosburgh's instructions.

Claimant was later referred for treatment to Dr. Fevurly, with the first examination occurring on April 26, 2002. At that time, he noted that claimant had been moved to a new job in 2001 and developed bilateral arm discomfort associated with that job. He performed an examination on claimant's bilateral upper extremities, and her cervical and thoracic spine. The neurological examination as well as all other examinations were normal. He performed multiple tests on claimant, including blood tests, nerve conduction tests and x-rays, all of which were normal. He did, at one time, inject claimant in the right elbow with cortisone, which resulted in no improvement. He examined claimant on June 11, 2002,

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

with the findings being the same. He again examined claimant on July 23, 2002, at which time he noted claimant's range of motion and upper extremity examinations were the same. Claimant's pain complaints at this time were limited to the right upper extremity. During his examinations, he was unable to elicit anything of an objective nature and determined that claimant was at maximum medical improvement as of July 23, 2002. He rated claimant at 5 percent to the right upper extremity for what he described as non-specific and unremitting pain, which he stated under the fourth edition of the *AMA Guides*, Chapter 15, was an appropriate diagnosis and justified the rating. He noted that, while claimant was undergoing psychological counseling at the time, he found no connection between claimant's work-related symptoms and her psychological difficulties.

Dr. Fevurly last examined claimant on July 23, 2004, over two years after she last worked for respondent, with her complaints being the same. She did indicate that her left upper extremity had improved some, but the right upper extremity remained subjectively symptomatic. His ultimate diagnosis was non-specific bilateral upper extremity pain without explanation by objective pathology.³ He stated that every test possible was done to find objective damage, but no objective damage was discovered. He was asked specifically about Dr. Rope's diagnosis of myofascial pain syndrome. Dr. Fevurly described that as a controversial diagnosis, which may or may not exist. Dr. Fevurly did note claimant had generalized pain throughout the upper extremity, but stated this was not the appropriate test to elicit a myofascial pain diagnosis. He acknowledged that if he was using the section of the *AMA Guides* dealing with the upper extremities, claimant would have no functional impairment.

Dr. Rope examined claimant on June 7, 2002. At first, it was indicated that Dr. Rope was unaware that claimant was undergoing treatment at the time of his examination. The record is also unclear as to whether Dr. Rope was aware that claimant was undergoing physical therapy at the time as well. Dr. Rope did note on page 24 of his deposition that claimant had been to four weeks of physical therapy treatments, but it was unclear from Dr. Rope's testimony whether he was aware of the extent of claimant's physical therapy. Dr. Fevurly indicated that claimant attended fourteen different physical therapy sessions at his direction, although the dates of those sessions are unclear in this record.

Dr. Rope, as was the case with Dr. Fevurly, could find no objective symptoms associated with claimant's complaints. All objective testing was normal. However, Dr. Rope did not have x-rays or EMG test results for review. He did acknowledge that myofascial pain syndrome can improve with physical therapy, again raising the question whether he was aware of the extent of claimant's physical therapy.

³ Fevurly Depo. at 11.

During his examination, Dr. Rope noted exacerbating factors associated with claimant's ongoing complaints, including prolonged driving, cooking, cleaning and writing. On cross-examination, he admitted that the normal trigger point tenderness, which would indicate myofascial pain syndrome, was not present in claimant's case. She simply had generalized tenderness without the specific trigger points.

In assessing claimant a 10 percent impairment, Dr. Rope cited the fourth edition of the *AMA Guides*⁴ as being the basis for his determination. However, when asked about specific charts, tables or guides, he was unable to identify any specific section of the *AMA Guides* that he would have utilized in reaching that impairment rating. He also agreed the *AMA* specifically suggests that ratings are inappropriate before the treatment is concluded.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁵

In K.S.A. 44-510e, functional impairment is defined as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.⁶

In this instance, both Dr. Rope and Dr. Fevurly assessed claimant impairments citing the fourth edition of the *AMA Guides*. However, Dr. Rope was unable to specifically identify any section of the *Guides* utilized in his evaluation and rating opinion. Dr. Fevurly, on the other hand, cited Chapter 15 of the *AMA Guides*, which does allow an impairment rating for non-specific unremitting pain. Even without the objective abnormalities tested for, Dr. Fevurly did not alter his opinion, stating that the 5 percent impairment to claimant's right upper extremity was an appropriate impairment rating under these circumstances.

Claimant argues that the 10 percent impairment to the body assessed by Dr. Rope is the more credible impairment rating. The Board, however, notes, as K.S.A. 44-510e requires the use of the *AMA Guides* and as Dr. Rope was unable to specifically identify any section, table or chart utilized in his impairment opinion, the Board finds Dr. Rope's 10 percent impairment to be less credible. Additionally, the fact that Dr. Rope evaluated

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁵ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

⁶ K.S.A. 44-510e(a).

claimant at a time when claimant was continuing treatment undermines Dr. Rope's ability to properly assess claimant at maximum medical improvement. Dr. Rope's opinion would have been more credible had he been advised of claimant's ongoing treatment status with Dr. Fevurly at the time of the examination.

Dr. Fevurly's evaluation and assessment of a 5 percent impairment to the right upper extremity is the more credible opinion. First, Dr. Fevurly, as the treating physician, had the opportunity to evaluate claimant over a period of several months and five examinations. Additionally, Dr. Fevurly's use of Chapter 15 of the *AMA Guides*, when assessing claimant an impairment specifically for unremitting pain, is convincing. The Board finds that the determination by the ALJ that claimant has suffered a 5 percent impairment to the right upper extremity is appropriate and should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated February 28, 2005, should be, and is hereby, affirmed in all regards.

IT IS SO ORDERED.

Dated this ____ day of June 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director